

James Scott

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MARCH 5. 1771.

8th March
1771
Refuse

UNTU THE RIGHT HONOURABLE,
THE LORDS OF COUNCIL AND SESSION,

THE
PETITION

OF
JAMES SCOTT of Comiestown;

HUMBLY SHEWETH,

THAT about the year 1672, the petitioner's predecessor, *John Scott of Comiestown*, acquired right to the lands of *Wardroperton*, lying within the parish of *Ecclesgreig*, and sheriffdom of *Kincardine*, and formerly belonging to *Sir Robert Graham of Morprie*, in virtue of fundry adjudications for large sums of money deduced against the said *Sir Robert Graham*, at the instance of many creditors; which being acquired about that period by the said *John Scott*, infestments accordingly followed thereupon in his person; and thereafter, in the year 1681, a charter was passed under the great seal, in favours of the said *John Scott*, and his heirs, proceeding upon the resignation of himself, as infest upon the adjudications, and likewise, upon the resignation of the said *Sir Robert Graham*, against whom they had been deduced.

That at this period 1672, *Andrew Straton* possessed the lands of *Wardroperton*: He possessed them, as now appears, under certain rights of tack flowing from *Sir Robert Graham of Morprie*, executed many years before that period: And it would appear, indeed, that, so far back as the year 1620, the *Stratons* had become tenants in these lands, under the *Grahams of Morprie*.

That,

That, as the rights, under which the possession was then held, have now, for the first time, been brought into light, in consequence of the action of reduction, to be afterwards mentioned, insisted in at the petitioner's instance: So, however much there may have been, from that period down to the present times, a general and dark belief in the country, that the tenants in these lands, possessed under titles singular in their nature, and of long endurance; and however much the petitioner's predecessors may have, along with the country, possessed that same general belief and idea of their rights; yet the petitioner is well warranted to say, that the precise nature of the right, either with respect to its term of endurance, or to the conditions thereof, was, in no shape, known in the country, nor ever inquired into by the petitioner's predecessors, from the period of their acquiring right in the 1672, till the present reduction, at the petitioner's instance, was insisted in. The possessors of these lands were considered as a sort of kindly tenants, attached to the family, such as there are in many parts of the country; and the petitioner believes, and is confident, that such was the idea of the country concerning them. But how far a knowledge, or rather belief, of the general nature before-mentioned, either of the country, or of the petitioner's predecessors, ought to infer an approbation or homologation of these rights against the petitioner, will be afterwards submitted: He will only beg leave here to state the real fact, how these rights have remained so long unknown and unchallenged by his predecessors.

The rent or tack-duty which was paid for these lands at the time the petitioner's predecessor, *John Scott*, before mentioned, acquired right thereto, being in those days reckoned tolerably adequate to the value of the lands, it would appear, that that circumstance had introduced an inattention and forbearance on his part, inasmuch that he would seem never to have given himself any trouble in making the proper inquiries into his rights, but to have permitted the tenants to continue the possession of the lands, upon the same terms as formerly, without any challenge; though it is now, in a good measure, beyond doubt, that he might then have prevailed in an action of removing. The said *John Scott* was succeeded in the lands of *Wardroper-town*, about the year 1708, by his nephew, Lieutenant-General *James*

James Scott of *Comiestown*, the petitioner's father; and, owing partly, perhaps, to the same causes which have been before suggested, and partly to the military profession of the petitioner's father, which admitted not of a constant residence at home, and, when at home, led him not into inquiries of that nature, the successors of the said *Andrew Straton* continued to possess the foresaid lands, by the same precarious tenure which is before set forth, so long as the said General *James Scott* remained heritor of these lands. He, however, denuded himself thereof, about the year 1727, in favours of his eldest son, the late Colonel *John Scott* of *Comiestown*, the petitioner's brother; whose profession being the same with his father's, the *Stratons* continued to possess in the same manner as formerly, until the death of the late *Robert Straton* in the year 1764, when his son, *George Straton*, defender in the reduction after mentioned, being out of the country, and though informed of his father's death, and solicited by his friends to return, and assume what they began to call the hereditary possession of the family; yet, refusing so to do, the late Colonel *Scott* was led to inquire into this pretended hereditary right, and soon resolved no longer to acknowledge any such. And this circumstance is worthy of notice, that the first inquiry which appears to have been seriously made, by any of the petitioner's predecessors, into the rights under reduction, was occasioned by the death of the late *Robert Straton*, in the year 1764, when the circumstances of that family were such as called for the attention of the late Colonel *Scott*, to his own rights, and led him to look into that title under which they now began to lay claim to a perpetual possession.

Hitherto no right of possession had ever been produced or openly avowed; no tack had ever been renewed, no right of possession whatever had been granted to any of the defender's predecessors, nor had titles ever been made up to the tack in the person of any of them, from the time that the petitioner's granduncle acquired right to the lands, in 1672. Rents had indeed been received from them, but in the most general terms, and without the most distant reference to any particular right of possession; and the general, imperfect, and dark knowledge, or belief, of the country concerning their right, seemed rather to have been the title of their possession, than any particular known and solid right; and as they, upon their part, had never hitherto openly asserted any such perpetual right of possession, so the petitioner's predecessors had never, as yet, brought any

any action against the possessors of *Wardroperstown*, for removing them from the possession of these lands.

Hitherto likewise, the tenants of these lands, possessing by the above precarious tenure, had been careful to give their masters no particular cause of complaint or observation; and, by means of an inoffensive conduct, as well as of the other circumstances before noticed, had escaped all serious or strict scrutiny into the right of their possession. The ignorance, or indulgence of their masters, co-operating with this prudent and inoffensive behaviour upon their parts, had hitherto occasioned that silence and forbearance, which, the petitioner is sorry to find, is likely, now, to militate against him with your Lordships.

Upon the death, however, of the late *Robert Straton*, the circumstances of that family were such, as drew the observation of the late Colonel *Scott*, and awakened his attention towards his own rights, the perpetual and hereditary right of these tenants being now openly talked of. *George Straton*, the son of *Robert*, was out of the country: No person knew where he was; the accounts of him, at least, were vague and uncertain. Sometimes it was given out that he was dead, sometimes that he was immediately to be in the country; but still, he refused or neglected to do so, and continued for a considerable time to amuse his friends with these contradictory accounts. The widow of *Robert Straton* died soon after her husband, and the daughters were all of them at such open variance with one another, each endeavouring to take every undue advantage, that the possession of the lands was likely to be miserably torn and distracted by their divisions, in so much, that a sequestration thereof was sometime thereafter obtained in this court, at the suit of one of the daughters, and a factor accordingly appointed.

It was at this period, and when the family was in these singular circumstances, that the late Colonel *Scott* was led to inquire into the rights which have since been brought to trial; but he being, from the year 1765, in a very declining state of health, and his death happening soon thereafter, in the beginning of the year 1767, the petitioner, his successor in the lands of *Wardroperstown*, pursued the inquiry; he soon became acquainted with the nature of the deeds upon which the tenants in these lands pretended to graft their hereditary right of possession, and which, owing to the causes before suggested, had so long been uninquir-

red

" *samen*, swa that it shall not be leifom and lawful to the said
 " Sir Robert and his heirs and successors, any ways to remove
 " the said Andrew Straton, and his foresaids, furth and frae the
 " said town and lands, houses, &c. at any time hereafter, nor
 " any ways to trouble and molest them, directly or indirectly,
 " in their said peaceable possession thereof, *they paying the fore-*
 " *said grassum at the entry of ilk nineteen years space*, and ordi-
 " nary yearly duty foresaid, to the said Sir Robert and his above-
 " written. But, on the contrary, the said Sir Robert binds and
 " obliges him and his foresaids, to maintain and defend the said
 " Andrew Straton, and his foresaids, in the peaceable possession
 " thereof, *during their pleasure*, and that at all hands, and a-
 " gainst all deadly, as law will: And in case at any time hereaf-
 " ter, the said Sir Robert and his foresaids, *shall refuse to receive*
 " the said grassum, and yearly duty foresaid, but shall permit
 " and suffer the same to remain in the said Andrew and his fore-
 " saids their hands, for the space of ane, twa, or mae years,
 " *and thereby press and strive to annul and discharge this pre-*
 " *sent right of tack of the said lands and others foresaid, and*
 " *obligements therein contained*; that then, and in that case, the
 " consignation of the said grassum-duty, in the hands of an suf-
 " ficient and responsal baron, in case of refusal thereof, within
 " the sheriffdom of Kincardine, to be furthcoming to the said Sir
 " Robert and his foresaids their use, *and the overture of the said*
 " *yearly duty to them, in presence of a notar and witnesses, as*
 " *effeirs, shall be equivalent to the yearly payment thereof; and*
 " *discharge all action, instance, and execution, that may any*
 " ways trouble, molest, stop, or impede the said Andrew and
 " his foresaids, in the peaceable joicing and possessing of the
 " said possession, salmon-fishing, and others foresaid."

It is likewise agreed on between the said parties, " That in case
 " the said Andrew Straton, and his foresaids, *shall suffer the yearly*
 " *duty foresaid, of the said lands, salmon fishing, and others above-*
 " *written, to remain in their hands, unpaid, for the space of twa*
 " *years, so that twa terms of the said yearly duty shall run in*
 " the third, without payment making thereof, or overture, as
 " said is; that then, and in that case, *this present prorogation*
 " *of the said tack shall expire, be null, of no force nor effect in*
 " *no time thereafter, with the haill obligations in the same.*
 " And further, it is specially provided and agreed upon betwixt

“ the said parties, that the said *Andrew Straton*, nor his forefairs,
 “ shall noways sell, assign, transfer, or dispoise this present pro-
 “ rogation of the foresaid tack of the said lands, fishings, teinds,
 “ and others foresaid, to any person or persons whatsoever; but
 “ by the first special advice and consent of four neutral friends,
 “ mutually chosen by the said Sir Robert, Andrew, and their
 “ forefairs, for that effect: As also, the said *Andrew Straton*
 “ binds and obliges him and his forefairs, in bodily service, in
 “ riding and travelling with the said Sir Robert, and his fore-
 “ fairs, as they shall be desired, during all the days and space of this
 “ present prorogation; and that upon the said Sir Robert, and
 “ his forefairs, their reasonable charges and expences allenar-
 “ ly.”

Dec. 26.
 1656.

By a deed or contract, of this date, entered into between the
 said Sir Robert Graham, younger, and *Andrew Straton*, proceed-
 ing upon the narrative of the foresaid prorogation of tack, the
 said *Andrew Straton* renounces all right and interest he had, or
 could pretend to the salmon fishing above mentioned upon the
 sands of the said lands of *Wardropertown*, set to him, together
 therewith; and on the other part, the said Sir Robert Gra-
 ham “ Discharges the said *Andrew Straton* of the sum of five hun-
 “ dred merks, quibilk was to be given to the said Sir Robert, and
 “ his forefairs, at the beginning of every nineteen years tack,
 “ after the expiring of the first nineteen years tack, and obli-
 “ ges him and his forefairs, never to seek any grassum of the
 “ said lands of *Warbertown*, or fishing foresaid, in no time co-
 “ ming.” The said Sir Robert likewise obliges himself to ratify and
 approve of the foresaid prorogation, in the haill articles thereof,
 except the salmon fishing. He likewise discharges the tacksmen
 of the six bolls of coals, which, by the prorogation, he was ob-
 liged to deliver yearly, upon his being only to carry them, and to
 pay 8 l. Scots of vicarage as the price thereof.

Such is the extraordinary nature, and such the terms of that
 right of possession which appeared upon production of the deeds cal-
 led for; under these, the defender's predecessors are said to have
 enjoyed for so long a course of years, the possession of these lands
 of *Wardropertown* as tacksmen thereof, and under these the de-
 fender now lays claim to a right of perpetual possession. The
 petitioner was glad to find, that, agreeable to his apprehension
 thereof, your Lordships were generally of opinion, that they were
 of

of such a singular nature, and deviated so far from the nature of a proper tack, that they could not be looked upon as coming under the statute concerning tacks; and therefore, were not effectual against singular successors.

The reasons of reduction insisted upon by the petitioner, were,
 1^{mo}, That the contract or deed of prorogation under reduction, is a right of an anomalous nature, and not known in law, such as could not be binding upon the granter's heirs; and, at any rate, could not be binding upon the pursuer or his predecessors, as being singular successors of Sir Robert Graham of Morphee, granter of the said deed, by adjudication and otherways.

2^{do}, The foresaid contract or deed of prorogation, could not be binding on the pursuer or his predecessors, in so far as the tack of the said lands is thereby prorogated, after the granter was denuded by adjudication, and other singular titles in the person of the pursuer's predecessors; and which, therefore, is not such a tack as could be effectual against a singular successor, in terms of the act of parliament 1449. Or,

3^{tho}, The foresaid contract or deed of prorogation, wants those requisites which are essential to the true and proper nature of an effectual tack, particularly it wants a definite ish or termination, the duration of the same being pendent entirely on the pleasure of the tenant.

4^{tho}, Without prejudice to these grounds of challenge, the deed of prorogation is at an end, by the heir of the tacksman having, for the space of years, or thereby, lain out, and tacitly repudiated his right and possession under it. And,

5^{tho}, An irritancy has been incurred by two terms rent having run into the third unpaid.

These were all of them pregnant and relevant grounds of reduction, and when the action came before the Lord Pitfour Ordinary, upon the 25th January 1770, his Lordship, after hearing counsel in the cause, ordained the parties to prepare and give in memorials thereupon; which being accordingly done, his Lordship, upon the 1st December last, made *avisandum* to your Lordships, and ordained informations to be prepared and given in. These were accordingly exhibited, and along with that, upon the part of the defender, was produced a multiplicity of discharges of rents granted to his predecessors, which according to the terms in which

which they are conceived, are noways prejudicial, but rather favourable to the petitioner, and which the petitioner had not formerly an opportunity of seeing.

The merits of the cause were treated at considerable length in the information upon the part of the petitioner:

As to the *first* reason of reduction, viz. That the foresaid deed of prorogation is an anomalous right; it was insisted, that from the perusal thereof, it was obvious, that it was such a right as was not known in the law of *Scotland*, and as could in no shape be sustained against a singular successor. And the petitioner had the satisfaction to find, that several of your Lordships entertained the same idea of the deed.

As to the *second* and *third* reasons of reduction, which imported that the right was not binding as a tack upon a singular successor; the petitioner, after establishing the law in that matter to be such as represented by him, and in which he was countenanced by the general voice of your Lordships, endeavoured to shew, in the *first* place, that the deed of prorogation 1642, was not followed with possession, before the entry of the petitioner's predecessor in the 1672, the same being first to commence at the expiry of the tack 1620; and the tack 1620 not being then expired, and that the same was therefore *never* binding on the petitioner's predecessor *John Scott*. Further, he endeavoured to shew, That although possession had followed upon the deed, yet that the prorogations therein were conferred *in tempus indebitum*. And, to illustrate this, he observed, that the deed 1642 must necessarily be explained in one of two ways; either as being of a complicated nature, and containing so many distinct and successive tacks or prorogations with definite issues, so as every nineteen years may be understood to be a new tack and a fresh prorogation, or as being one entire tack, commencing from the expiry of the tack 1620, when the prorogation was first to take place; whereof the whole term of years was to be joined together, and the succession of nineteen years after nineteen years to be looked on as the term of endurance: That, upon attentively considering the deed, he apprehended it fell to be explained in the first way, as containing so many distinct tacks or prorogations of 19 years each, for each of which a grassum was payable, though the same was discharged by the contract 1656; and that, in this explanation of the deed, he was strongly confirmed by the doctrine of the civil law,

One only circumstance concerning the interpretation in

in a matter which seemed to be analogous, viz. the doctrine *de annuis legatis*, and likewise by the decision of your Lordships, in the case, 2d July 1757, Creditors of *Darnock* against *Carlisses*; and that therefore, although possession had followed upon the deed 1642, before the entry of the petitioner's predecessor in 1672; yet, after expiry of the prorogation of nineteen years then current, the succeeding prorogation of nineteen years, considered as a new tack or fresh prorogation, was not clothed with possession, but was conferred *in tempus indebitum*, and was therefore *no longer* binding on the petitioner's predecessor.

In the next place, the petitioner endeavoured to show, that, in the second view of the deed before exhibited, viz. as being one entire tack, and the succession of nineteen years after nineteen years the term of endurance, that it yet laboured under the want of an essential requisite, viz. a definite ish or termination, the same being intirely pendent on the will of the tenant, and was therefore such a tack as was totally unavailable against a singular successor, however far effectual against the heirs of the granter: And it was likewise upon this head observed, that the deed fell to be considered in this last view thereof, if the contract 1656, by discharging the grassum payable each nineteen years, should be thought so far to alter the nature and construction of that deed, as no longer to admit of its being understood to include so many distinct tacks or prorogations.

From these arguments, the petitioner concluded, that his predecessor, *John Scott*, having become, about the year 1672, a singular successor in the lands of *Wardropertown*, the foresaid deed of prorogation was either *never* binding upon him, as not being followed with possession before his entry, or though followed with possession, as wanting an ish; or, at least, was *no longer* binding upon him, than till the expiration of the nineteen years current at the time of his entry, if the petitioner's interpretation of the deed be adopted, more especially, as his right was by adjudication, as well as other singular titles.

Thus far, likewise, the petitioner had the satisfaction to find, that the general opinion of the court was favourable to the arguments which he had advanced; and your Lordships seemed to be agreed, that the deed under reduction would not have been effectual against his predecessor, *John Scott*, at the time of his entry to these lands, in 1672. One only circumstance concerning the interpreta-

tion of the deed, considered as wanting an *ish*, seemed to weigh with some of your Lordships, viz. That the tack was granted to the tenant and his heirs; and that it might therefore be considered as a tack containing an *ish*, viz. *when the family was at an end*, which, in the common chance of human affairs, could not be supposed to last for so long a course of time as your Lordships have often sustained tacks for. But the petitioner must beg leave to observe, 1st, That the tack is granted to heirs and *assignies*, though these last must be approved of by the heritor. But, 2^{dly}, It very rarely happens, that a family is so much at an end, as not to have an heir, in some degree of relation, who would therefore be intitled to the tack in question, (as it is destined to heirs in general, and not to any special set of heirs, such as heirs-male; which destination might, perhaps, have been interpreted to be a definite indeterminate *ish*); and that, though it were to be supposed, that an heir was to be wanting to the family, yet the Crown, which never fails, might, in such case, be intitled to claim the tack as *ultimus haeres*. But, further, it is to be observed, that though the destination of this tack to heirs, might be supposed to afford a chance, or probability of an *ish*; yet, according to the argument maintained by the petitioner, and which, he humbly apprehends, is founded in law, as it met with the sanction of your Lordships' opinion, tacks of an immoderate term of endurance are ineffectual against singular successors, as well as tacks without an *ish*; and therefore, as the destination to heirs must undoubtedly imply, at least, *an immoderate term of endurance*, the deed in question could not be binding upon the petitioner's predecessor, considered as a singular successor.

The petitioner, therefore, is emboldened, by the general voice of your Lordships, to say, that the deed in question was ineffectual against his predecessor *John Scott*, agreeable to what was argued for him: But, as he was thus far successful, so he felt his disappointment the more, when some of your Lordships seemed to be of opinion, that the deed of prorogation under reduction, was secured against the present challenge by *prescription*; and when most of your Lordships seemed to be of opinion, that the petitioner's predecessors, by allowing the tenants to continue so long in possession, without challenge, and by receiving the rents from them for so long a course of years, had *approved of and homologated the deed of prorogation under reduction*;

tion; and that the petitioner was therefore barred from insisting in that right of challenge, which might have been effectual at an earlier period, in the person of his predecessors: And, upon these grounds, your Lordships accordingly, upon the 19th February last, "sustained the defences proponed for the defender, and assolizied."

As the petitioner cannot but think his case is hard, that a tack, of such an unfavourable nature, not granted by him or his predecessors, nor ever, with any certainty, known to, or canvassed by them, and certainly, never acknowledged by them, (a right too, which the petitioner is now well warranted to say, was totally ineffectual against his predecessor *John Scott* the singular successor,) should now, when first brought into light, and under legal challenge, be nailed down upon him, and a valuable part of his property thus in a manner lost to him for ever, and that by presumption alone, and a conduct of the petitioner's predecessors, which consists rather in a *bare tolerance* upon their part, than in any direct or positive act, homologation of such a right, null in itself as to singular successors, of a nature likewise so very unfavourable and extraordinary, imposing such a heavy and perpetual burden upon the property of the petitioner, should be inferred. He humbly hopes your Lordships will pardon him for being so much under the influence of these considerations, as to be prompted to submit to your review this interlocutor; and, in doing so, he does not mean to detain your Lordships, by resuming, more than he has already done, any of the arguments in law, relating to the inefficacy of the present right, against the petitioner's predecessor, *John Scott*, considered as a singular successor. These arguments were formerly stated for him, and met with the sanction of your Lordships opinion; he will, therefore, confine himself, in submitting this interlocutor to your Lordships review, to those points which have been before suggested, and which alone seemed to influence your Lordships in giving judgment.

He will first, therefore, endeavour to show, that the right under reduction, cannot be secured against the present challenge by prescription, either positive or negative. And, 2^{dly}, Although the deed in question was ineffectual against the petitioner's predecessor, *John Scott*, the petitioner will next inquire, what effect can be given to the possession of the defender's predecessors since
that

that time, and how far any homologation of the right under reduction, can, in this case, be presumed against the petitioner's predecessors, so as to affect the petitioner, as representing them, and to bar his right of challenge now insisted in.

Before proceeding, however, to consider these points, which are the chief object of this petition, he must beg leave, in a preliminary observation, to recal to your Lordships remembrance, and to beg your Lordships particular attention to the explanation or interpretation of the deed of prorogation, as it is before suggested, and was at greater length stated in his information. The deed, as the petitioner has set forth, falls necessarily to be explained in one of two ways; either as being of a *complicated nature* and containing so many distinct tacks or prorogations of nineteen years each, and so containing as many distinct *ishes* as there are tacks, or as *one entire tack*, containing an unlimited term of endurance; and, in that view of the deed, it must be understood as a tack without an *ish*. The petitioner has explained it, agreeable to what, in his humble apprehension, is the natural and proper interpretation, upon attentively perusing it, and considering its import, as containing so many distinct tacks and prorogations, just as if the succession of prorogations had not been contained in the same deed, but separate tacks had been granted for each nineteen years; and he has called for your Lordships particular attention to this interpretation of the deed, and made it a preliminary observation, because it may be of importance to his future argument, both upon the point of *prescription*, and the point of *homologation*.

In support of this interpretation of the deed, it is to be observed, that at the period of granting the deed 1642, tacks without an *ish*, or of unlimited endurance, were null in themselves, were unknown in the law, and unknown in the country. It could, therefore, never be such a deed that was intended by the parties; they knew the impropriety, and would be advised of the invalidity of such a right. At the same time, as Sir Robert Graham seems to have been desirous of executing a right of a *very beneficial nature*, in favours of *Andrew Straton*; so, in order that it might likewise be *good in law*, he had undoubtedly been advised to execute the deed, in the form and terms in which it now appears, whereby the objection of the *want of an ish* might not stand against it, but that it might be understood to include

as many distinct tacks or prorogations of nineteen years each, as *Andrew Straton* and his successors should incline, having each of them a distinct ish, just as if separate tacks, of nineteen years each, had been executed. And, accordingly, the perusal of the deed will very much justify this interpretation thereof, and particularly the stipulation of paying a grassum *at the entry* of each nineteen years, *as the condition thereof*, by the payment whereof the necessity of a new tack or prorogation was meant to be superseded. The perusal of the contract 1656 will likewise strongly support this interpretation: For, by that contract, the meaning of parties as to the former deed 1642 is rendered obvious, as they there call each period of nineteen years a *nineteen years tack*. And, agreeable to this interpretation of the deed, some of your Lordships seemed to be of opinion, that the tenant could not at this day give up his possession, *during the currency of a nineteen years*.

The doctrine likewise of the civil law, *de annuis legatis*, appears to the petitioner to be a strong confirmation of the above construction of the deed; as likewise the doctrine of the law of this country, concerning bonds of pension or annuity; where it is looked upon as if separate obligations were granted for each year's annuity; and so your Lordships decided *July 1730, Lockhart*: And if there were still any difficulty in that matter, the decision of your Lordships, *2d July 1757, Creditors of Dornock contra Carlisles*, seems to the petitioner to put the matter beyond doubt.

The petitioner having made this preliminary observation, which he thought it was proper for him to do, both because it may affect his future argument, and because your Lordships seemed not to regard the distinction, and, in giving judgment, to have proceeded upon the idea alone of the deed under reduction being a tack without an ish, whereby several of the petitioner's arguments were not attended to, will now proceed to the points of *prescription* and *homologation* before mentioned.

With respect to prescription. The right under reduction, must either be secured by the positive prescription, or the petitioner's right of challenge must be cut off by the negative prescription. Your Lordships, however, will observe, that if the interpretation put by the petitioner upon the deed under reduction, shall be adopted by your Lordships, the deed can never be rendered binding upon

upon the petitioner, by virtue of either. The smallest reflection will show, how perfectly absurd such an argument or supposition would be, because every nineteen years, considered as a distinct tack, behoved to be the subject of a separate prescription, agreeable to the doctrine of the civil law, *de annuis legatis*, and likewise of the law of this country, concerning a similar subject before mentioned; and since the unalterable term of prescription of heritable rights is 40 years, the absurdity of supposing that the deed in question can be secured, or rendered effectual against the petitioner by prescription, or the lapse of time, is abundantly obvious. Prescription, therefore, can have no place in the above view of the deed: There are no *termini habiles* for such a plea, and arguments arising therefrom cannot fall upon the deed.

First, then, As to the positive prescription, the deed, considered as *one entire tack without an ish*, being a right of unlimited endurance, and imposing a perpetual burden upon lands, cannot be secured by the positive prescription, there being no infeftment or *sasine* for a *prescriptive title*. And your Lordships will observe, what strange consequences would ensue, if such a right as the present could be secured by the positive prescription; for not only would the faith of the records be thereby unhinged, and the security of singular successors destroyed, in as much as prescription would render such a right (being in itself of an unlimited endurance) equal to a perpetual feu, without giving singular successors an opportunity of discovering it upon record, but likewise, the principles of the law, in the matter of prescription, governed and restricted by positive statute, would be destroyed. The statute 1617, concerning prescription, requires *sasine* as a title for prescription of lands; but if prescription were to validate such a right as the present, considered as a tack *without an ish*, or secure it against all challenge, it would, in fact, be prescribing a right in lands, without the requisite prescriptive title.

It is true, that real rights which do not require *sasine* for their constitution, may be secured by the positive prescription, as well as rights which must necessarily be so constituted. Thus, a right of patronage, which, in some cases, it is not necessary should be constituted by *sasine*, may still, in such cases, be secured by the positive prescription. Thus likewise, heritable offices may be secured by the positive prescription, and so likewise may tacks; but then your Lordships will observe, that it is only proper tacks, understood

stood not as perpetual, but as temporary rights, that can so be secured for the years thereof unexpired, (*Stair, Book 2. tit. 12. par. 23.*) and during their continuance, (*Bankton, Book 2. tit. 12. par. 8.*) And here lies the material distinction, in considering the present question between the case of a right of patronage, which was instanced by some of your Lordships, and the present right of tack, considered as a tack *without an ish*; for, in the case of a patronage, the right itself, though in some cases it may not require *safine* for its constitution, is yet a *valid* and *effectual* right in law: And accordingly, there are other heritable rights, such as heritable offices, which do not require infeftment to their constitution, and may yet be secured by the positive prescription: And so likewise it holds with respect to proper tacks; for these, though they require no *safine* for their constitution, may be secured by the positive prescription, as before mentioned: But a tack, such as the present, considered as a tack *without an ish*, is absolutely *null* in law, and ineffectual as to singular successors; and therefore, if such a right were capable of being secured by the positive prescription, without *safine* for a prescriptive title, it would, indeed, be intrenching deeply upon the sacred principles of the law, as well as upon the security of singular successors.

And this leads the petitioner to observe, in the *next* place, That the deed under reduction, considered as a tack *without an ish*, is, by law, *null*: And though your Lordships have been in use to sustain such rights as good against the granter and his heirs, upon the foot of their implying an obligation not to remove, as formerly argued for the petitioner; yet still, they are *null* in law as to singular successors, and cannot therefore be a title of prescription against them, because, *quod initio vitiosum, tractu temporis convalescere non potest*: And therefore, the title being in itself *null* from the beginning, and liable to be so declared, it cannot be secured by the positive prescription, or acquire any strength therefrom, no more than an *infeftment that is null*. The pursuer is advised, that the positive prescription only supplies *want of right* in the author, who is supposed to be *non dominus*; but that it can never supply intrinsic defects and nullities, which appear *ex facie* of the deed, which it must always bear about with it, and which must therefore be always fatal to its subsistence; because, *quod initio vitiosum, tractu temporis convalescere non potest*.

But

But further, your Lordships will observe, that the deed under reduction cannot be secured by the positive prescription, if the petitioner's right of challenge, and his objections to the deed under reduction, are not, and cannot be cut off by the negative prescription. And it is proper here to observe, that unless the defender had secured his right by the positive prescription, which the petitioner has shown he cannot, the negative prescription cannot be objected by him against the petitioner, agreeable to the principles of law: For the petitioner humbly apprehends, that if the right under reduction was ineffectual against the petitioner's predecessor, *John Scott*, the possession thereafter must be accounted to be *ex gr^a*, and can never, therefore, hurt or impair any ground of challenge competent to the heritor, when he shall think proper to make use of it: *Suo jure utebatur*, when he allowed the tenants to continue their possession; *suo jure nunc utitur*, when he insists on their removing: And the principle of law is, that *res mere facultatis non prescribuntur*.

But further, the pursuer is advised, that as the right under reduction is *null* and ineffectual as to singular successors, the petitioner's right of challenge against it, cannot be lost to him by the negative prescription, which can only take off *extrinsic* legal objections, but cannot remove *intrinsic* nullities, as appears from *Bankton*, B. 2. tit. 12. § 21. And the distinction betwixt these two is very material: *Extrinsic* objections suppose the right *effectual*, till taken out of the way by reduction, which, therefore, annuls the same; and, unless that right of challenge against such reducible deed be insisted in within the legal time, it may be lapsed by the negative prescription: But *intrinsic* nullities suppose the right *null* and *void*, and the reduction thereupon is only *declaratory*; it does not annul the right, which was null in itself, but declares, that it was void *from the beginning*. And it was so found with respect to an adjudication, 25th July 1738, *Ainslie contra Watson*; and so likewise it must hold with respect to a null infestment, and every other *null* right, and, consequently, a *null* tack among the rest.

The application of this doctrine to the present case is abundantly obvious. The tack under reduction, considered as a tack *without an ish*, was, in those days when it was granted, *viz.* 1642, and likewise in the days of the petitioner's predecessor *John Scott*, who acquired right to these lands in 1672, *null*, even as to the granter.

granter and his heirs, much more so as to singular successors; and though such rights have since been sustained against the former, yet still they are *null* as to the latter; and therefore, the petitioner's objections against it, as being a *null* right, cannot be lost to him by the negative prescription. And, agreeable to the above doctrine, the plea of prescription was disregarded by your Lordships, in the case of *Frazer of Belladrum*, and the tack was not sustained, though there appeared to be in that case even a prescriptive title, infestment having followed upon the tack in virtue of a precept of *fasine* contained therein.

What the petitioner has before stated as the law in this matter, may be well illustrated, by supposing that an action founded on the tack in question had been pursued against the petitioner. In that case, it is apprehended there is little doubt that the objection against the tack, as being *null*, might at any time be pleaded in bar of that action, by way of exception, being an intrinsic nullity; and your Lordships know, that what is only pleadable by way of exception, cannot be lapsed by the negative prescription. *Bankton*, b. 2. tit. 12. § 21.—25th July 1738, *Ainsley*.

The petitioner has only further to observe upon the point of prescription, That though the plea of prescription, either positive or negative, were admissible in this case, so as to secure the deed of prorogation, considered as one entire tack *wanting an ish*; yet, unless there was proof before your Lordships, that the possession which has been hitherto enjoyed by the defender's predecessors was under the deed of prorogation, your Lordships could not give effect to that plea of prescription. There is, however, by no means, any such proof; but, on the contrary, there are strong presumptions, that the possession has not been under that deed, arising chiefly from the discrepancy between the rent payable by that deed, and the rent which has been for a course of years received by the heritors, as will be afterwards more particularly mentioned.

Thus, therefore, the petitioner has endeavoured to show, and he humbly flatters himself he has succeeded in satisfying your Lordships, that the deed under reduction cannot be secured against the effects of the present challenge, by virtue of prescription, either positive or negative. If the deed is considered as containing so many distinct tacks, there are not *termini habiles* for such a plea; and if the deed is considered as one entire tack, without an *ish*, it is not founded in law. The petitioner will therefore proceed to consider, what will be the effect of the pos-

possession which the defender's predecessors have for so long a time enjoyed, and how far any homologation of the right under reduction can in this case be presumed against the petitioner's predecessors, so as to affect the petitioner, and bar his right of challenge now insisted in. And this he will endeavour to do, by showing,

1st, That there is in this case no proof that the possession hitherto has been held by the defender's predecessors, and the rents paid by them, as under the deed of prorogation 1642; but that there is legal presumptions to the contrary; and that, therefore, homologation cannot be presumed therefrom.

2^{dly}, That though the possession hitherto, and the rent that has been paid, had been entirely conformable to that deed, yet there is no proof, or legal presumption, that the petitioner's predecessors knew of this right; and unless they had proper and exact knowledge thereof, their consent thereto could not be presumed; and, consequently, homologation could not be inferred against them.

3^{dly}, That as, where facts, inferring knowledge of, and consent to a right, may be ascribed to another cause, such consent is not, agreeable to the principles of the law, to be presumed; and as, in this case, there is another title, viz. *tacit relocation*, to which the possession hitherto of the tenant, and the acquiescence of the heritor may be imputed, homologation cannot, in this case, be presumed.

And, lastly, That though homologation could, in this case, be presumed; yet, agreeable to the petitioner's interpretation of the deed, it can only validate the prorogation of 19 years *presently current*, or which had commenced before interruption by this present action.

As to the *first*, There is no proof, that the possession of the defender's predecessors has been under the deed of prorogation 1642; but, on the contrary, there are strong and legal presumptions arising from that deed itself, that the possession was not held under it.

And it may first be observed, that one of the motives of granting that deed, was to encourage and animate the tacksmen to further the policy in his possession. But, as the petitioner has before stated the fact, so far from that motive or expectation being answered, the lands of Wardropertown have been all along most miserably neglected. And this, so total a neglect of improvement, for so long a course of time, is of itself a presumption, that the tenants had no exact knowledge that the right of their possession was of

so lasting a nature, as, by this deed, it appears to be: It is a presumption, that their possession was not *under* such a lasting right, but was rather understood to be *precarious*, and such as would not *encourage* and *animate* the tacksman to improvement. And one thing is very presumable, that if the lands had been improved, that circumstance might naturally have led the tenant, *for his security*, as well as the heritor, *for his interest*, to inquire into the matter with more accuracy: But by the *total* neglect of improvement, these motives of inquiry have never existed.

Again, by that deed, the tacksman is bound in bodily service, in riding and travelling with the heritor, as he shall be desired, during all the days and space of the prorogation. No service, however, of that kind has ever been performed or required; which is a strong presumption, that the *nature* of the rights were not known, nor the *terms* thereof inquired into, as it is not to be thought, that such a condition, if it had been known, would have been neglected by the heritor, for so long a course of time. And, on the other hand, if it shall be presumed, that the right and *terms* thereof were known by the heritors, it is a very strong presumption, that they did not mean to do any thing which might be construed into an *homologation* of the tack. It might have naturally occurred to them, that that would have been the case, if performance of such a *singular* condition had been demanded and fulfilled; because such a *special* condition could flow from nothing, and be ascribed to nothing but a *special* agreement to that purpose, known to the parties: And, in like manner, upon the supposition that the right had been known to the heritors, it might have naturally occurred to them, that receiving payment of the *ordinary tack-duty*, which is a *chief* and *customary* condition of every tack, would not be so construed into an homologation of the tack, seeing rent was, in all events, due by them, so long as they possessed; and that, till they were interrupted, they were liable to pay no more than the old rent. And it is observable, that in the discharges granted by Sir Robert Graham, before he was denuded of the lands, *services* are discharged along with the other duties; but in none of the discharges granted by the petitioner's predecessors, is there mention made of *services*; and though services due by tenants are discharged by the act, abolishing ward-holdings, yet that act is but a late one: Due and performed they certainly were before that act; and the *service* enjoined by the deed in question, being particularly inserted therein, it is imagined the act does not strike against it. It

It may further be observed, as a presumption in favour of the petitioner's plea, that by the deed 1642, as well as the contract 1656, certain special conditions were agreed on with respect to mills, in case the tacksmen should, in virtue of powers given him, build any. If mills had, in consequence thereof, been erected, and the *special* conditions accordingly complied with, these, as they could only flow from, and be ascribed to *special* agreement, *known* to the parties, might have been laid hold of as a circumstance for inferring homologation of that *special* agreement; but no mills having ever been erected, there is no room, from the performance of any *special* conditions arising therefrom, to infer homologation.

In the same way, with respect to the grassum of 500 merks, which was payable at the beginning of each 19 years, and which, by the contract 1656, was discharged; if that grassum had not been discharged, but had been regularly paid each 19 years, the performance of such a *special* condition, which could take its rise from nothing but a *special* agreement *known* to the parties, and the receiving the grassums each 19 years, might have been construed into an homologation of that *special* agreement; but, by that grassum being discharged, there was thereafter no room, from the performance of any such *special* condition, for inferring homologation.

In like manner, with respect to the power of assigning the tack, which, by the deed, cannot be done, without the consent therein mentioned; if such a transaction had ever taken place, or been executed *in terms of the deed*, and if a stranger had accordingly been introduced into this possession, the *terms* and *manner* of such transaction being so *special*ly marked out by the deed, there might have been ground for inferring homologation thereof. Thus, if at any time, *four persons* had been named to adhibit their consent to an assignation of the tack, *in terms of the deed*, the consent to such a *special* mode of transaction, which could take its rise from *special* agreement alone, might have been prejudicial to the petitioner; but no such thing was ever proposed, much less executed: On the contrary, so far from any *public* transaction of that nature having ever been in agitation, the successors of *Andrew Straton* did never make up titles to the tack in question, by any *public* legal method, such as *service* or *re-tour*, till the defender did so after after this action was commenced.

Thus, therefore, it is singular, that in this right of tack, which contained so many *special* and *uncommon* conditions, relating

ting to *bodily service*, to the *mills*, to the *grossum*, and to the *mode of assignation*, there is no room for your Lordships to infer, from performance of any of these *uncommon* conditions, which could take their rise from *special* agreement alone, any homologation of that right, the *first* of these conditions never having been performed, though due, the *second* and *last* never having existed, and the *third* having been discharged, and therefore being no longer incumbent; and that the only ground upon which homologation can be presumed, in this case, is the simple payment of the *ordinary* and *accustomed* tack-duty, which was in use to be paid by the tenants. Where, therefore, as in this case, the simple payment of the *accustomed* rent, is the only thing, which has been performed, and where, at the same time, there were so many *special* conditions, and none of these have been performed, so as to create any solid presumption, the receiving of the rent, though it had been in *exact conformity* to the deed, ought to have much less influence in inferring homologation.

And this leads the petitioner to observe, that it does by no means appear, that the rent has been hitherto paid, as *under* the deed 1642; for your Lordships will observe, that there is a considerable discrepancy between the rent *payable* by that deed, and the rent which has been for a course of years *received* by the heritors. Thus the rent payable by the deed, is *six chalders* and *12 bolls*, half meal and half bear, and *4 bolls* of wheat, with a barrel of salmon, and *6 bolls* of coals. By the contract 1656, the barrel of salmon is discharged, and in place of the *6 bolls* of coals, the carriage of them only is required, and *8 l. Scots* of vicarage, as the price thereof. The rent, therefore, remained to be *54 bolls of meal*, *54 bolls of bear*, *4 bolls of wheat*, the carriage of *6 bolls of coals*, and *8 l. Scots* of vicarage: But the rent received for a course of years by the heritor, has been *60 bolls of bear*, and *57 bolls of meal*, with *8 l. Scots* of vicarage; and no carriage of coals has been performed or required. When this alteration of the payment of the rent was introduced, the petitioner cannot say; only, it would appear, that the *4 bolls of wheat* was exacted by Sir Robert Graham, so long as he remained heritor of these lands: And accordingly, there appears among the discharges exhibited by the defender, a discharge for the *wheat*, granted by him upon the *23d November 1663*, for that crop and year; but there appears no discharge by any of the petitioner's predecessors for that article: And as the first appearance of such an alteration having taken place, is a discharge granted by the petitioner's predecessor, *John Scott*, of date, *11th February*

1698, whereby he grants receipt for 60 bolls of bear, and 57 bolls of meal, as due for crop 1696, it would appear, that the alteration did certainly take place between the 1663 and 1696; and, indeed, it is very presumable, from the first appearance thereof, being in the 1696, that it was *then* first introduced by the petitioner's predecessor. Accordingly, the discharge for crop 1697, likewise particularly mentions the new rent of 60 bolls of bear, and 57 bolls of meal; and the discharges for sometime thereafter, regularly mention bear, meal, and vicarage, without specifying the quantities. There is here, therefore, in some respects more, and in other respects, less rent paid than that which is due by the deeds. Thus, there have been received 6 bolls of bear, and 3 bolls of meal, more than what was due, in terms of the tack; and there has not been paid by the tacksmen, in terms thereof, either the 4 bolls of wheat, or the carriage of the 6 bolls of coals. This new-modelled rent, therefore, is a legal presumption, that there had been some new paction between the parties, whereupon the possession of the defender's predecessors did thereafter proceed; and it cannot, by any legal presumption, be ascribed to the deed of prorogation, so as to have the effect of inferring homologation thereof, more especially, as it has been found by your Lordships, that receiving of rent *expressly* under a tack, will not infer homologation, or bar reduction thereof; 27th February 1668, *Chalmers contra Wood*, observed by *Stair*; 12th March 1684, *Archbishop of St. Andrews contra Beaton*, observed by *Falconer*, being a still stronger case; and January 1734, *Home of Manderston contra Taylor and Husband*. If, in these cases, the receiving of rent *expressly* under a tack, which is only reducible, will not bar reduction thereof, much less ought this *nuda patientia* of the petitioner's predecessors, in allowing the tenants to possess, and in receiving their rents for such possession, to infer homologation of a right like the present, which, if considered as a tack *without an ish*, is null in itself, and of so unfavourable a character.

As to the discharges of rent which have been granted by the petitioner's predecessors, they are all of them of the most general tenor, without the most distant relation to any right or tack whatsoever, but in general, for the duties payable for the occupation of the lands for the respective crops; they are uniformly conceived in the same cautious style; and indeed, though the deed of prorogation had never existed, the discharges must have been conceived in the very same terms: If any presumption at all arises from them, the petitioner apprehends it is rather in his

his favour, as they seem to avoid mentioning any tack, and to be industriously conceived in these general terms: more especially, as the discharges of Sir Robert Graham, before he was denudded of the lands, appear to be much more special than those granted by the petitioner's predecessors, being generally granted to Andrew Straton, my tenant, for mails, farms, customs, profits, teind-silver, vicarage, mill-multure, due services, &c. It would, therefore, in the petitioner's humble apprehension, be hard, to infer homologation against him, from discharges of such a general style and import, as those granted by his predecessors: More especially, as in the case, *Home contra Corser*, 30th November 1671, observed by Stair, the granting of discharges, specially mentioning and referring to a right of tack, was found by your Lordships not to import homologation for subsequent years, but only for the years that were discharged. And, what is still stronger, the paying of annualrents upon a bond, will not infer homologation of that bond against the debtor, having a ground of reduction against it; 14th February 1668 *MacKenzie contra Fairholm*. It is therefore imagined, that the utmost force these discharges can have, agreeable to the doctrine before laid down, is, to homologate for the years that are past, but will never be construed into an act of homologation of a right which, if the petitioner's interpretation thereof is not adopted, imposes a perpetual burden upon his property for all future years, without any prospect of a period.

But, 2dly, Though the possession hitherto, and the rents that have been paid, had been entirely conformable to the deed, yet there is no proof or legal presumption that the defender's predecessors knew of that right; and, without their exact knowledge thereof, homologation could not be inferred against them. From what has been stated upon the former head, it is obvious, that there is evidently no proof, that the defender's predecessors knew of the deed of prorogation, but, on the contrary, all the presumptions ly the other way. It is not an imperfect or dark knowledge of a deed, such as the petitioner has formerly observed, was all that the country, or his predecessors, were possessed of with respect to the deed under reduction, that can in law be looked upon as sufficient to infer homologation thereof; the knowledge must be perfect and precise: For homologation implies an approbation; and one cannot approve of a deed, the precise terms whereof he does not know. Accordingly, the facts inferring such knowledge, must be strong, direct, incontrovertible, and such as are inconsistent with

Bankton,
b. 1. tit. 11.
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an ignorance of the deed. None of the facts, however, before mentioned are such; on the contrary, not only all of them are consistent with ignorance of the deed, but many of them afford strong presumptions that it was not known: Some of them are hardly reconcilable to a knowledge of it; the strongest of them resolve into a *nuda patientia*, upon the part of the petitioner's predecessors; and none of them can, by the most forced interpretation, be said to afford the slightest presumptions of any precise or certain knowledge of the *terms* and *conditions* thereof. It is not possible, in the petitioner's apprehension, to say or conclude, from all the circumstances which can be mustered up against him, that any of his predecessors had such a *full and perfect* knowledge of the *nature* and *terms* of this lease, as can warrant a court of law to find, that they had *approved* of the deed under reduction; and, without such *approbation*, homologation cannot be presumed.

But as there is no proof or legal presumption, from any of the facts of the defender's predecessors, that they *knew* of this deed, and *consented* thereto; so, in the *third* place, though there was such presumption of knowledge and consent, yet, as where facts inferring knowledge of, or consent to a right, may be ascribed to another cause, such consent is not, agreeable to the principles of the law, to be presumed; and as, in this case, there is another title, *viz. tacit relocation*, to which the possession hitherto of the tenants, and the acquiescence of the heritor may be imputed, homologation cannot, in this case, be presumed.

That, where facts inferring knowledge and consent may be imputed to another cause, such consent is not to be presumed, the petitioner apprehends, is the established doctrine of the law; and the reason is plain, homologation is a stretch of legal presumption, which ought not to be practised or exercised, where the presumed consent inferring it can be otherwise accounted for. Thus, in the case, *Barns contra Young*, 12th December 1665, observed by *Stair*, *possessing lands* to which a person had right by investment, did not infer homologation of that investment, there being another title to which it could be ascribed, *viz. a right of apparenay*. Thus, likewise, the *exception* of certain rights from the warrantice of a disposition, will not infer homologation of these rights against the disponee, being intended only as a security to the granter from recourse; 18th July 1710, *Gibson contra Trotter*, observed by *Forbes*. Thus, likewise, in cases of minority, many of which are to be seen in the *Dictio-*

nary (homologation) page 380 and 381, the deeds of a minor, after majority, will not infer homologation of a right reducible on the head of minority and lesion, if such deeds can be anyways ascribed to other causes. Thus, likewise, in the cases before mentioned, 27th February 1668, *Chalmers contra Wood*, 12th March 1684; Archbishop of *St. Andrews contra Beaton*; January 1734, *Hume contra Taylor*; taking the benefit of a reducible right, will not, upon the same principle, be sufficient to infer homologation, because it may be imputed to other motives than that of consent to, or homologation of the right. And thus, likewise, a tenant's possession, and an heritor's acquiescence therein, if imputable to tacit relocation, will not infer consent to, or approbation of a reducible tack, much less of a tack absolutely null as to singular successors, such as the present, considered as a tack without an ish, most undoubtedly is. And it may be proper here to observe, that it is not necessary, that the facts inferring knowledge or consent, may be ascribed to another cause by legal presumption: It is sufficient, if there are *termini habiles* for doing so.

And this leads the petitioner to inquire, Whether the possession of the defender's predecessors, and the receiving rent from them for such possession, from which circumstance alone, consent or approbation can be presumed, may, in this case, be imputed to tacit relocation?

Your Lordships will, therefore, observe, that as, if the deed of prorogation 1642, which did not commence till after expiry of the tack 1620, was not so commenced at the time of the entry of the petitioner's predecessor, in 1672, (the tack 1620 not being then expired,) the same, as being conferred *in tempus indebitum*, was not effectual against the petitioner's predecessor, *John Scott*: So the possession of the defender's predecessors, after expiry of that tack 1620, is, with much propriety, and agreeable to the principles of law, imputable to tacit relocation, at least, there is no inconsistency, but, on the contrary, the clearest *termini habiles*, for so imputing it; more especially, as the petitioner has already shown, that there are no circumstances in this case, which can, by any legal presumption, militate against the petitioner, in imputing that possession to tacit relocation, or render such a construction forced and unnatural; but, on the contrary, that there are presumptions arising from the circumstances before mentioned attending this case, and particularly the discrepancy of the rents, which are favourable to the petitioner in this matter. Accordingly, some of your Lordships seemed

to think, that as homologation would not be presumed, if there was room for tacit relocation; so, if the tack 1620 was not expired, and the deed of prorogation by that means followed with possession at the entry of the petitioner's predecessors, which was in the 1672, (though, by those of your Lordships it was thought to be in 1681,) there would be room for tacit relocation. Here therefore the petitioner must beg leave to put your Lordships in mind of the conjectural and constructive evidence, arising from the deeds 1642 and 1656, which was laid before your Lordships in his information, that the tack 1620 was not expired in the 1672, when the petitioner's predecessors entered to the lands, the same being to endure for *nineteen years after the death of* Christian Straton, the bishop of *Aberdeen's* widow; and she having lived, or, at least, by every presumption, lived till after the 1653; and, if she did so, the tack 1620 was not expired in the 1672. But the petitioner, upon perusing the deed 1642, can now inform your Lordships, with more certainty, that *Christian Straton* was alive at that time; for not only is she mentioned in several places of the deed, without the term of *deceast* or *umquibil*, which is customary in executing deeds where a person mentioned is not alive, but likewise, towards the end of the deed, in the clause relating to the building of mills, and the duties which should be payable on that account, it proceeds, "Beginning the first term's payment of the samen, betwixt the first *Yule* and *Candlemas* next and immediately following *after the decease of the said* Christian Straton, and nineteen years space fore-said thereafter." These words plainly import, that she was alive in the 1642, when that deed was executed: She might then have been about 22 years a widow; and if she lived eleven years thereafter, which is not an extravagant supposition, (as she might not even then have been above 50 or 60 years of age,) the tack 1620 was evidently not expired at the entry of the petitioner's predecessor: And if the presumption arising from the contract 1656, is not sufficient to support that supposition, and your Lordships shall think it material to have that fact ascertained, it may be in the power of the petitioner to ascertain it, by some proper proof, if your Lordships shall think fit.

But there will be no occasion for entering into this inquiry, as the petitioner will not have occasion to use the argument which he has drawn therefrom, if he is right in the interpretation

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pretation of the deed, as containing so many distinct tacks or prorogations; for, in that case, even supposing possession had followed upon the deed of prorogation before the 1672, yet, after expiry of the nineteen years tack *then* current, the succeeding prorogation of nineteen years, considered as a new tack, was conferred *in tempus indebitum*, and was not effectual against the petitioner's predecessors: And therefore, agreeable to the arguments before mentioned, and the opinion of such of your Lordships as thought, that if possession had not followed upon the deed 1642, before the singular successor's entry, relocation might take place, the possession of the defender's predecessors, after the expiry of the nineteen years then current, is imputable to that same title of relocation; nor can that possession be even understood to be under the succeeding prorogations of nineteen years respectively and successively, so as to validate such prorogations. It is therefore, in the petitioner's apprehension, obvious, that if he is right in his interpretation of the deed, the possession of the defender's predecessors, being with so much propriety, and agreeable to the principles of law, imputable to the title of relocation, cannot infer homologation against him.

But in the *next* place, though your Lordships were not to adopt the petitioner's interpretation of the deed, but to explain it as being one entire tack, without an *ish*, the petitioner humbly apprehends, that there are likewise *termini habiles* for the petitioner imputing the possession of the defender's predecessors to tacit relocation: For, *first*, if possession had not followed upon that deed, considered as one entire tack before the entry of the petitioner's predecessor, (and how far it did, is before inquired into,) then, agreeable to the doctrine before laid down, there is room for imputing the possession, after expiry of the tack 1620, to tacit relocation. And if, on the other hand, it shall appear, that possession had so followed thereupon, yet still the right being *null* in itself, and ineffectual against singular successors, however far good against the granter and his heirs, the possession, after the entry of the petitioner's predecessor, is likewise imputable to tacit relocation: For the petitioner is advised, that tacit relocation takes place, even *resoluto jure dantis*; and therefore, after the granter of the prorogation was denuded of the lands in favours of the petitioner's predecessor, and the right was thereby become ineffectual against him, the possession might

might, with propriety, and agreeable to the principles of law, be continued by the tenants, in virtue of tacit relocation, till they were interrupted and removed, as was found in a similar case, 16th January 1663, Earl of Errol contra Parillioners of the Urie, observed by Stair. Thus then tacit relocation, after the entry of the petitioner's predecessor, when the right as to him became null, was a proper and habile title for the tenants to possess the lands at the accustomed rent, till interrupted and removed, in the same way as a tacksmen is entitled to possess on a reducible tack, till the same be taken out of the way, as was found in the case before mentioned, 27th February 1668, Chalmers contra Wood. The petitioner therefore humbly apprehends, that in either view of the deed before mentioned, there are *termini habiles*; and it is agreeable to the principles of law, to impute the possession of the defender's predecessors to tacit relocation.

Thus, therefore, the petitioner humbly flatters himself, he has succeeded in satisfying your Lordships, that no homologation of the deed under reduction can in this case be inferred against him. 1st, Because there is no proof, that the possession hitherto has been held by the defender's predecessors, and the rents paid by them as *under* the deed of prorogation 1642, but strong legal presumptions to the contrary. 2dly, Because there is no proof, that the petitioner's predecessors had such a knowledge of this right, and of the *terms* thereof, as that they can be presumed to have homologated the same, or *approved* thereof. 3dly, Because, although there was such presumption of knowledge and consent, yet where facts inferring knowledge and consent can be ascribed to another cause, such consent is not, agreeable to the principles of law, to be presumed. And, in this case, there is another title, *viz. Tacit relocation*; to which the possession hitherto of the tenants, and the acquiescence of the heritors, may be properly and habilely ascribed.

The petitioner will now, in the *last* place, endeavour to show, that though homologation could in this case be presumed, yet, agreeable to the petitioner's interpretation of the deed, it can only validate the prorogation of nineteen years presently current, or which had commenced before interruption by this present action. And here your Lordships will observe, that if the deed is considered as containing distinct tacks and prorogations, just as if separate tacks had been granted for each nineteen years, commencing

cing successively after the expiry of one another, such homologation must fall upon the deed, so as to affect each tack or prorogation *separately*; and therefore, it can only serve to validate each prorogation *during the currency of the nineteen years*, but can have no effect in validating or securing any *succeeding* prorogation, considered as a new tack, till possession shall have commenced thereupon: For, to suppose that the deed contains so many *distinct tacks*, just as if the succession of prorogations had not been contained in the same deed, but separate prorogations, granted for each nineteen years, which is entirely agreeable to the petitioner's interpretation thereof; and, at the same time, to suppose, that the possession of the tenants, and the other circumstances before mentioned, (if they shall be understood at all to infer homologation), are to infer homologation of any of the *future* prorogations which have not yet commenced, are contradictory suppositions; they cannot exist together; the one is destructive of the other; and the last supposition does, in fact, resolve into an interpretation of the deed, as one entire tack, *without an ish*. Agreeable, therefore, to the petitioner's doctrine, such homologation can only validate the prorogation of nineteen years which is *presently* current, or which had commenced before interruption was made by the petitioner, in the present action.

And this leads the petitioner to conclude, upon the point of homologation, with a single observation which he begs leave to offer, upon the supposition, that the deed of prorogation is considered as one entire tack, *without an ish*. Your Lordships will observe, that the arguments before used by the petitioner, upon the point of homologation, have generally occurred in cases where the right to be homologated was of a *common and ordinary* kind; and most frequently indeed, where the right was of a *temporary and finite* nature, such as tacks for *short or moderate* terms of endurance, liferents, bonds, and other *common* rights, which meet with the favourable reception and interpretation of the law. But the *unfavourable* nature of the present right, the petitioner has no occasion to explain to your Lordships: He is persuaded, that you cannot peruse it, and consider the terms of it, and attend to the consequences with which, if declared binding upon the petitioner by presumed homologation, it will be attended, without perceiving how singularly unfavourable it is, in as much as it creates a grievous and perpetual burden upon

upon his property, without the most distant prospect of a period, and thereby deprives him of the use and enjoyment of a valuable part of his property *for ever*. In such a case, the petitioner flatters himself, your Lordships will not willingly infer, by such slender presumptions as occur in this case, any *homologation* or *approbation* of such an *extraordinary* right, which, it is not in itself likely, the petitioner's predecessors could mean to homologae or approve of by their forbearance. Nor can the petitioner imagine, that your Lordships, as judges of the rights of parties, can ever, after considering the circumstances of this case, look upon the petitioner to be in the same situation with Sir Robert Graham of Morphee, whose invention contrived, whose will executed, and whose hand must *for ever* witness the execution of that extraordinary deed: And he is therefore humbly hopeful, that your Lordships will not, in this case, apply what is among the strictest and most arbitrary doctrines of the law, against him, in order to support the deed under reduction, whatever you might do in the case of a common and ordinary right, which meets with the favourable interpretation of the law.

And now, the petitioner does not mean to detain your Lordships with many words; only, with respect to the two last reasons of reduction in his summons, *viz.* the dereliction of the tack, by the defender's wilfully lying out, and declining for so long a time to take up the possession, and more particularly the irritancy which, during that time, was incurred by two years rent being unpaid: He will beg leave to refer your Lordships to those arguments which were urged for him in the information; which your Lordships did not enter upon, nor consider the import of, though, in the petitioner's apprehension, they were worthy of some notice: And where the question is concerning a right of so *unfavourable* a character, he humbly apprehends your Lordships ought to apply the law against it with more strictness and less reluctance, than in the case of a right of a more *favourable* aspect. Your Lordships will observe, with respect to the irritancy, that the last discharge which is granted to these tenants, is for crop 1764; *partial* receipts are likewise granted for the crop 1765; and some part of the rent for crop 1766, appears to have been *imposed* upon the servants of the late Colonel Scott, *without his authority*: But, as has been before represented, after the death of the late Robert Straton in 1764, and of his widow in 1765, the defender his son was out of the country,

try, contradictory accounts of him were transmitted home, and the rest of the family fell into the greatest variance, whereby the possession of the lands was torn and distracted, the rents neglected to be paid, and a sequestration thereof at last obtained. Accordingly, your Lordships see, that no offer of rent is made by the defender till 21st *October* 1768; but the irritancy, which by the deed of prorogation is declared to be incurred by *two years rent being unpaid, without overture thereof*, was clearly incurred: No discharge was granted by the late Colonel *Scott* for any crop since the 1764: And though payments were thereafter made, yet the crop 1766 was not paid, or ever uplifted by Colonel *Scott*, or the petitioner, or offered to them in the manner prescribed by the deed; which declares, that such offer is to be made in presence of a notary and witnesses; and it is only when so made, that it is to be accounted equivalent to payment, and to discharge action, &c. With respect to the crop 1767, it is not so much as pretended, that any offer thereof was made till the term of payment of that crop, viz. *Candlemas* 1768, was past. In *March* thereafter, a sort of offer is made by one of the subtenants, but without any proper authority; and the first offer of any moment, is that of the 21st *October* 1768, after the defender was returned home; but before then, and at *Candlemas* 1768, the irritancy was incurred. And it is a circumstance which ought not to escape your Lordships notice, when considering the effect of the neglect of payment of the rent in this case, that the defender knew perfectly well of his father's death, for no less than four years before he returned home: That during that time, he was mostly in *Britain*: That the most contradictory and fabricated accounts were given of him; sometimes that he was dead, sometimes that he was alive; and that, in this manner the petitioner was amused, till his actual return. The petitioner, therefore, apprehends, your Lordships will examine with strictness, that neglect of payment of the rent, which, he does contend, is sufficient to establish the irritancy contained in the deed of prorogation, whereby it ought to become lapsed and at an end.

As the arguments formerly urged by the petitioner on the merits of this cause, were held by your Lordships to be good in law, but the effect of them, in his favour, to be nevertheless barred and excluded by homologation, he is hopeful your Lordships will excuse him for stating what occurs to him on that point at so much length

length as he has done in this petition; and he flatters himself, that what he has humbly submitted to your consideration, will induce you to alter the interlocutor complained of.

May it therefore please your Lordships, to review your interlocutor of the 19th February, before complained of; and to find, 1mo, That the right under reduction was never effectual against the petitioner's predecessor, John Scott, he being a singular successor to Sir Robert Graham of Morphie, the grantor thereof; or, at least, no longer than till the expiry of the prorogation of 19 years, then current. 2do, That as it was not binding upon the petitioner's predecessor, John Scott, so it cannot now be secured against the present challenge, by prescription either positive or negative. 3tio, That it cannot either be secured against the present challenge by the circumstances before-mentioned, the same not being sufficient to infer homologation against the petitioner's predecessors; or, at least, if such circumstances are sufficient to infer homologation, that it can only validate and secure the prorogation of 19 years, presently current, or which had commenced before interruption by the present action; and that the defender is removable from the lands of Wardroper-town, after expiry thereof: Or, 4to, To find, that the deed is at an end by the dereliction of the defender, and the irritancy incurred by non-payment of rent; and, therefore, to sustain the reasons of reduction, and decern in the declarator and removing accordingly.

According to justice, &c.

JOHN SCOTT.